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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S  
RULING NO. C99-1/21

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001

Complaint on Post E.C.S.

Docket No C99-1

PRESIDING OFFICER'S RULING ON  
UNITED STATES POSTAL SERVICE REQUEST FOR  
PARTIAL RECONSIDERATION OF P.O. RULING NO. C99-1/20  
AND REQUEST FOR EXTENSION OF TIME TO FILE RESPONSE

(Issued April 24, 2001)

In Ruling No. C99-1/20, I directed the Postal Service to produce certain categories of information that might bear on establishing the domestic or international character of Post E.C.S. service, on the basis of actual transactions that have occurred to date.<sup>1</sup> On March 23, the Postal Service filed a request for partial reconsideration of that ruling, coupled with a request for an extension of time in which to respond to some of the interrogatories.<sup>2</sup>

First, the Service asks for reconsideration of one aspect of my ruling compelling responses to Interrogatories UPS/USPS-47(f), -52, and -54, to permit the Service to narrow the temporal scope of its analyses to Post E.C.S. transactions that have occurred within the past 30 days. The Service represents that it has only identified records for transactions within this period, but also states that it will continue to search accounting files for additional responsive information. In the Service's view,

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<sup>1</sup> Presiding Officer's Ruling on Complainant's Outstanding Motions to Compel Responses to Discovery Requests Directed to United States Postal Service, March 16, 2001.

<sup>2</sup> United States Postal Service Request for Partial Reconsideration of P.O. Ruling No. C99-1/20 and Request for Extension of Time to File Response, March 23, 2001.

transactions for the most recent 30-day period would provide ample data that are representative of all Post E.C.S. transactions. Postal Service Request at 1-2.

Complainant United Parcel Service responds that it does not insist that the Service provide records going back to the inception of Post E.C.S. service, but expresses concern that 30 days may not be a sufficiently long timeframe. Illustratively, UPS raises the possibility that 30 days may be insufficient if Post E.C.S. transactions exhibit seasonal variation, as do certain types of hardcopy mail. Based on these concerns, UPS requests that the Service be required to search for and supply records covering the most recent 12-month period for which information is available. UPS Response of March 30, 2001, at 1-2.

In a supplemental pleading<sup>3</sup> filed on April 5, the Service reports that responsible officials have located records of Post E.C.S. transactions dating back to August, 2000, and states its belief that these files can be used to generate responses to the three interrogatories. Nevertheless, the Service also reiterates its argument that it would be reasonable to provide responses based on transactions during a 30-day period.

Pending a ruling on the other subjects of its request for reconsideration, the Postal Service subsequently withdrew its request for limitation to a 30-day retrospective interval, and provided a response based on all Post E.C.S. transaction data available for the period from July 10, 2000, to April 19, 2001.<sup>4</sup> The Service states that its response effectively moots its earlier counter-proposal of a 30-day period, and I agree. Therefore, this aspect of the Service's request for reconsideration is dismissed as moot.

The second ground on which the Postal Service seeks reconsideration relates to the ruling directing a response to UPS/USPS-47, which requests the total number of certain described Post E.C.S. transactions in addition to their relative proportion of all transactions. According to the Service, the total number of such transactions is

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<sup>3</sup> United States Postal Service Supplement to Request for Partial Reconsideration of P.O. Ruling No. C99-1/20 and Request for Extension of Time to File Response, April 5, 2001.

<sup>4</sup> United States Postal Service Compelled Response to United Parcel Service Interrogatories UPS/USPS-47(f) (In Part), -52, and -54, April 20, 2001.

irrelevant information. Moreover, the Service asserts, in combination with the requested proportions, reporting the number of transactions would reveal total Post E.C.S. transaction volumes. The Service submits that such data are commercially sensitive, as they would enable competitors to evaluate the success of Post E.C.S., and thereby judge the Service's strengths in, and share of, the secure electronic message market.

For this reason, the Service requests that it be relieved of the requirement to file the total number of transactions requested in UPS/USPS-47(f). Alternatively, the Service requests that it be allowed to file responsive data under the protective conditions specified in Order No. 1287. Postal Service Request for Reconsideration at 2.

UPS opposes the Service's request, arguing that the number of transactions is relevant because it could be significant for determining the Commission's jurisdiction over Post E.C.S. Illustratively, if the Postal Service response indicates that one percent of transactions are not associated with a foreign top level domain, UPS asserts that this small proportion may nonetheless represent a substantial volume of messages, depending on the number of total transactions. Lacking knowledge of this total, UPS observes, the Commission may be inclined to believe that the volume is *de minimis*, and on that basis decide not to assert jurisdiction over Post E.C.S. as a domestic service. UPS Response at 2-3.

UPS also reiterates its position that there is nothing commercially sensitive about the Postal Service's volume figures. According to UPS, the Service has not indicated how it would be competitively harmed if UPS were to know Post E.C.S. volumes. Indeed, UPS claims, the Service has already publicly disclosed the most telling information regarding the success of Post E.C.S. in the record of Docket No. R2000-1, wherein the Service stated that Post E.C.S. has always operated, and continues to operate, at a loss. Nonetheless, should the Commission find the requested volume

information to be commercially sensitive, UPS argues that it should be supplied under protective conditions, as the Postal Service suggests. *Id.* at 3-4.

In Ruling No. C99-1/9, I rejected the Service's claim that Post E.C.S. volume information is categorically irrelevant to this proceeding, finding that, "as a general matter, information regarding the respective origins and points of receipt of Post E.C.S. transactions is, potentially, highly relevant in this case."<sup>5</sup> However, I also recognized the potential merit of the Service's representations regarding the commercial sensitivity of such information.

In the case of UPS/USPS-47(f), I agree with UPS that the requested number of total transactions is potentially relevant to establishing whether there is an appreciable domestic segment of Post E.C.S. transactions. As UPS suggests, without such information it may not be feasible to assess whether the domestic proportion of transactions is of sufficient scale to constitute a significant and ongoing domestic service offering. Conversely, without such information it may not be possible to assess whether there is a significant international component of Post E.C.S. service.

However, I also concur with the Postal Service's claim that the requested volume total is commercially sensitive information, as it would place information bearing on the Service's market position in the hands of a firm which offers a service in direct competition. Unless and until it has been established that there is a domestic component of Post E.C.S. service that is subject to the Commission's jurisdiction under Chapter 36, in my view the public release of volume totals would not be justified. Therefore, I shall direct that the actual transaction count be provided under the protective conditions in effect in this proceeding.

Finally, the Service requests an extension for filing the responses at issue in light of the required search and preparation time, which it represents to be 21 days for UPS/USPS-47(f) and 6 person weeks for the remaining interrogatories. The Service

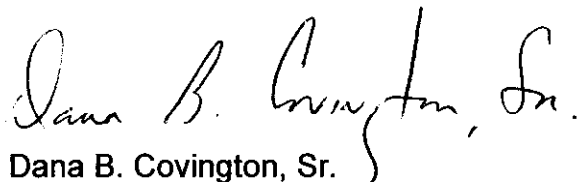
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<sup>5</sup> Presiding Officer's Ruling No. C99-1/9, August 9, 1999, at 8.

initially asked for an extension to April 20, and UPS did not oppose this request. Inasmuch as the Service has been able to produce responses to all the discovery requests except for the transaction count component of UPS/USPS-47(f), and the Service's estimated six-week interval will be completed on April 27, I believe it would be reasonable to grant an extension until Friday, April 27 for filing this response under protective conditions, and I shall so rule.

### RULING

1. The Motion United States Postal Service Request for Partial Reconsideration of P.O. Ruling No. C99-1/20 and Request for Extension of Time to File Response is granted in part, as described in the body of the ruling, and otherwise is dismissed as moot.
2. The transaction totals requested in UPS/USPS-47(f) shall be filed under the protective conditions adopted in this proceeding in Order No. 1287, which are attached hereto, by April 27, 2001.

  
Dana B. Covington, Sr.  
Presiding Officer

**STATEMENT OF COMPLIANCE  
WITH PROTECTIVE CONDITIONS**

The following protective conditions limit access to materials provided in Docket No. C99-1 by the Postal Service or other parties that the Presiding Officer or the Commission has directed to be produced and examined under protective conditions. Individuals seeking to obtain access to such material must agree to comply with these conditions, complete the attached certifications, provide the completed certifications to the Commission, and serve them upon counsel for the party submitting the confidential material.

1. Only a person who is either:

(a) an employee of the Postal Rate Commission (including the Office of the Consumer Advocate) with a need-to-know; or

(b) an individual participant in Postal Rate Commission Docket No. C99-1; or a person (not an employee) acting as outside counsel, agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. C99-1; shall be granted access to these materials. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. "Involved in competitive decision-making" includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.

2. Counsel for a person who fully satisfies the qualifications set forth in paragraph 1(b) above shall serve by hand delivery or facsimile transmission a copy of that person's completed certification on counsel for the party that has provided the material to which the person wishes to be granted access. The person shall not be granted access until the eighth day after such service has been made. The party providing the material, or any other party with an interest in the protection of the material, shall have until seven days after receipt of the certification to object to access being granted to such person, by filing an objection with the Commission and serving opposing counsel by hand delivery or facsimile transmission. If such an objection is filed, the participant seeking to examine protective materials may file a response within seven days from the time the objection is filed with the Commission. Any such response must be served upon filing the objection, by hand delivery or facsimile

transmission. If the Presiding Officer determines that the objection is not meritorious on its face, the Presiding Officer may issue a ruling granting access before receiving a response.

3. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions.

4. The final date of any participant's access shall be:

(a) the date on which the Postal Rate Commission issues its recommended decision or otherwise closes Docket No. C99-1; or

(b) the date on which that participant formally withdraws from Docket No. C99-1; or

(c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. C99-1 participant on whose behalf that person obtains access, whichever comes first. The participant immediately shall notify the Postal Rate Commission and counsel for the party who provided the protected material of the termination of any such business and consulting arrangement or retainer or affiliation that occurs before the closing of the evidentiary record.

5. Immediately after the Commission issues its recommended decision or otherwise closes Docket No. C99-1, a participant (and any person working on behalf of that participant) who has obtained a copy of these materials shall certify to the Commission:

(a) that the copy was maintained in accordance with these conditions (or others established by the Commission); and

(b) that the copy (and any duplicates) either have been destroyed or returned to the Commission.

6. The duties of any persons obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.

7. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially-sensitive, and privileged information.
8. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in Docket No. C99-1.
9. The duty of nondisclosure of anyone obtaining access to these materials is continuing, terminable only by specific order of the Commission.
10. Any Docket No. C99-1 participant or other person seeking access to these materials by requesting access, consents to these or such other conditions as the Commission may approve.



### CERTIFICATION

The undersigned represents that:

Access to materials provided in Docket No. C99-1 by a participant in response to rulings of the Presiding Officer or orders of the Commission and filed under protective conditions (hereinafter, "these materials" or "the information") has been authorized by the Commission.

The copy obtained is marked on every page with my name.

I agree to use the information only for purposes of analyzing matters at issue in Docket No. C99-1.

I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain in strict confidence these materials in accordance with all of the protective conditions set out above.

Name \_\_\_\_\_

Firm \_\_\_\_\_

Title \_\_\_\_\_

Representing \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_

**CERTIFICATION UPON RETURN OF  
PROTECTED MATERIALS**

When I obtained materials provided in Docket No. C99-1 by a participant in response to rulings of the Presiding Officer or orders of the Commission and filed under protective conditions, I certified to the Commission that I was eligible to receive it. I now affirm as follows:

1. I have remained eligible to receive access to materials under paragraph 1 of the protective conditions throughout the period those materials have been in my possession. Further, I have complied with all conditions, and have maintained these materials in strict confidence in accordance with all of the protective conditions set out above.
2. I have used the information only for purposes of analyzing matters at issue in Docket No. C99-1.
3. I have returned the information to the Postal Rate Commission.
4. I have either surrendered to the Postal Rate Commission or destroyed all copies of the information that I obtained or that have been made from that information.

Name \_\_\_\_\_

Firm \_\_\_\_\_

Title \_\_\_\_\_

Representing \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_